IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JORDAN LANE HIDDE,
Petitioner.

No. 2 CA-CR 2019-0109-PR
Filed October 21, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pinal County
No. S1100CR201402657
The Honorable Steven J. Fuller, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Deputy County Attorney, Florence
Counsel for Respondent

Jordan L. Hidde, Florence
In Propria Persona

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Jordan Hidde seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Hidde has not shown such abuse here.

¶2 After a jury trial, Hidde was convicted of two counts of aggravated assault stemming from an incident in which he fired an AR-15 rifle at the victims while they were in their vehicle, striking one of them. The trial court sentenced him to concurrent, 7.5-year prison terms. We affirmed his convictions and sentences on appeal. *State v. Hidde*, No. 2 CA-CR 2015-0417 (Ariz. App. Dec. 1, 2016) (mem. decision).

¶3 Hidde sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but found "no colorable claims" to raise in a post-conviction proceeding. Hidde filed a pro se petition, arguing his trial counsel had been ineffective in failing to raise issues related to the state's failure to collect as evidence a pellet gun found in the victims' vehicle and by waiving his presence during settling of jury instructions. He also asserted his appellate counsel had been ineffective in failing to argue on appeal that the prosecutor committed misconduct. The trial court summarily dismissed the petition, and this petition for review followed.

¶4 On review, Hidde repeats his claims of ineffective assistance of counsel. To avoid summary dismissal in a post-conviction proceeding, a defendant must present a colorable claim for relief, that is, he must "allege[] facts which, if true, would *probably* have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016). "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this

deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 Hidde first argues that trial and appellate counsel should have argued that the state acted in bad faith by failing to secure and test (for fingerprints and DNA) a pellet gun found under the seat of the victims' vehicle, thus violating his due process rights. *See State v. Lehr*, 227 Ariz. 140, ¶ 41 (2011). But, when evidence is lost or destroyed, law enforcement officers act in bad faith only if they were aware of the exculpatory value of that evidence. *See State v. O'Dell*, 202 Ariz. 453, ¶ 12 (App. 2002). We have already resolved that issue in this case by rejecting Hidde's argument on appeal that he was entitled to an instruction pursuant to *State v. Willits*, 96 Ariz. 184 (1964). In doing so, we determined that, when officers "found and returned the pellet gun" to the owner, "there was no obvious indication that it could have had any materially helpful evidentiary value." *Hidde*, No. 2 CA-CR 2015-0417, ¶ 11. We will not revisit that question now. *See State v. Whelan*, 208 Ariz. 168, ¶ 8 (App. 2004) (prior decision of appellate court may not be challenged in subsequent appeal to same court).

¶6 Hidde further asserts trial counsel should not have "discussed jury instructions with the court and counsel outside [his] presence" or "waiv[ed] a limiting instruction offered by th[e] Court." But he cites no authority suggesting an attorney cannot waive a defendant's presence for such discussions, or that it falls below prevailing professional norms to do so. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim). And, whether to decline a limiting instruction is a tactical decision to be made by counsel. *See State v. Reyes*, 146 Ariz. 131, 133 (App. 1985). As such, it cannot support a claim of ineffective assistance absent an allegation that the decision could have had no reasoned basis, which Hidde has not made. *See State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (reasoned tactical decision by counsel cannot support claim of ineffective assistance).

¶7 We next address Hidde's claim that his appellate counsel should have raised a claim of prosecutorial misconduct. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct . . . the prosecutor knows to be improper and prejudicial'" and "he pursues for any improper purpose with indifference to a significant resulting danger of mistrial." *State v. Aguilar*, 217 Ariz. 235, ¶ 11 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984)). Hidde has identified no conduct that supports a claim of misconduct and, thus, has identified no reason for appellate counsel to have raised such a claim.

¶8 Hidde first asserts that the prosecutor elicited "false" testimony from a witness: specifically that the ammunition he had used in his AR-15 was "military grade" and "not readily available for just normal folks like us." But, no evidence is cited suggesting the witness's testimony was false or misleading. Although Hidde invites us to conduct a "simple google search" which would show the ammunition is "widely available," we will not consider evidence not properly before us. *See State v. Schackart*, 190 Ariz. 238, 247 (1997) (reviewing court generally does not "consider materials that are outside the record"); *see also* Ariz. R. Crim. P. 32.5(d) (requiring defendant to "attach to the petition any affidavits, records, or other evidence" supporting petition's allegations).

¶9 Hidde next argues the prosecutor committed misconduct during cross-examination of his father, who had testified about Hidde's purported character for "restraint" and "good decision-making skills." The prosecutor asked Hidde's father if he was aware of an incident in which Hidde had "slash[ed] his manager's tires" after being fired. Hidde claims the question was improper. But the prosecutor's question was permitted under Rule 405(a), Ariz. R. Evid., which allows "an inquiry into relevant specific instances of the person's conduct" during cross-examination of a character witness. Hidde also suggests the state violated disclosure rules or ran afoul of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide the police report forming the basis of the prosecutor's question. He does not develop this argument in any meaningful way, and we therefore do not address it. *See Stefanovich*, 232 Ariz. 154, ¶ 16. For the same reason, we do not address his related argument that the prosecutor committed misconduct by referring to "[t]he Tempe incident" in a question.

¶10 Hidde additionally accuses the prosecutor of misconduct by "brandish[ing]" Hidde's AR-15 "before the jury" and calling it an "assault rifle." Not only does Hidde fail to identify anything in the record indicating the prosecutor "brandished" the rifle, the sole case he cites does not support his argument that such conduct would have been improper. In *United States v. Santos-Rivera*, the court found misconduct when the prosecutor brandished a weapon unconnected to the defendant to argue the defendant had been armed. 726 F.3d 17, 26-27 (1st Cir. 2013). Hidde has cited no authority suggesting a prosecutor commits misconduct by drawing the jury's attention to the defendant's weapon in an aggravated assault trial. Nor has he supported his claim that it was improper for the prosecutor to refer to the weapon as an assault rifle. *See Stefanovich*, 232 Ariz. 154, ¶ 16.

¶11 Last, Hidde claims the prosecutor elicited "prejudicial testimony" from his father by asking whether it was wise to mix "alcohol

with prescription pain killers and shooting." After Hidde's father explained he had no "experience with painkillers," the trial court sustained Hidde's objection that the line of questioning "[c]all[ed] for speculation." There is no indication in the record that the prosecutor, by asking this question, acted improperly or had any improper motive. *See Aguilar*, 217 Ariz. 235, ¶ 11. Indeed, on appeal, we concluded the trial court had not erred by allowing inquiry into Hidde's use of pain medication. *Hidde*, No. 2 CA-CR 2015-0417, ¶ 17.

¶12 Although we grant review, relief is denied.